

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE:)
) CA No. 01-12257-PBS
PHARMACEUTICAL INDUSTRY AVERAGE)
WHOLESALE PRICE LITIGATION) Pages 1-37
)

MOTION HEARING

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts
February 4, 2009, 3:50 p.m.

LEE A. MARZILLI
OFFICIAL COURT REPORTER
United States District Court
1 Courthouse Way, Room 3205
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A P P E A R A N C E S:

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P R O C E E D I N G S

THE CLERK: In re: Pharmaceutical Industry
Average Wholesale Price Litigation, Civil Action 01-12257,
will now be heard before this Court. Will counsel please
identify themselves for the record.

MS. BRECKENRIDGE: Jeniphr Breckenridge here on
behalf of the state of Arizona.

THE COURT: Are you with the Attorney General's
office or with Hagens Berman?

MS. BRECKENRIDGE: I'm with Hagens Berman.

THE COURT: So you're fairly new to arguing these,
right?

MS. BRECKENRIDGE: In the background on the state
cases. I've never had the pleasure of appearing in front of
you yet.

THE COURT: Mr. Montgomery has been.

MR. MONTGOMERY: John Montgomery for Warrick
Pharmaceuticals.

MR. BENNETT: And Dan Bennett, also for Warrick
Pharmaceuticals.

MR. MONTGOMERY: Actually, I guess we're here for
Schering as well.

MS. HARRIS: Kim Harris from Davis Polk for
AstraZeneca.

THE COURT: Also no stranger.

1 MR. SWEENEY: Tom Sweeney from Hogan & Hartson for
2 BMS.

3 MR. CYR: Brendan Cyr from Kelley Drye & Warren
4 for Dey.

5 THE COURT: There are a lot more defendants,
6 right? It's just people decided --

7 MR. MONTGOMERY: Yes, your Honor. I'm arguing on
8 behalf of all the defendants, though several of them may
9 wish to have something to add, but there are many, many
10 defendants.

11 THE COURT: Yes, and many, many drugs. So can I
12 just stop. Let me ask you this: Have you been involved in
13 the big case at all, what I call the --

14 MS. BRECKENRIDGE: In the MDL case?

15 THE COURT: Yes.

16 MS. BRECKENRIDGE: I was not involved in the
17 trial, but I have been involved in the MDL case, yes.

18 THE COURT: So I'm just trying to, when I was
19 reading the briefs, trying to get a handle on whether or not
20 you're seeking to duplicate the recovery that will be
21 recovered if all of these settlements go through.

22 MS. BRECKENRIDGE: We are not, and that is a good
23 question, and I anticipated you might want to start off
24 there. We are not seeking to duplicate anything. What the
25 Attorney General of Arizona is interested in pursuing, and

1 one of the reasons he brought the suit, is the civil
2 penalties on behalf of the state.

3 THE COURT: So you're not looking, assuming that
4 all the settlements are approved, you're not looking for
5 restitution on behalf of the consumers or third-party
6 payors, or any disgorgement or any of that sort of thing?
7 You're simply looking for either injunctive relief and/or
8 penalties?

9 MS. BRECKENRIDGE: Yes, that is correct. To the
10 extent that the claims of the citizens of Arizona are
11 covered by other settlements that will eventually become
12 final --

13 THE COURT: And when you were sitting in these
14 settlement discussions with Eric Green, was it disclosed
15 that you were looking for these penalties in addition to --
16 when I was sitting there on my couch last night reading
17 these, I was taken aback. Now, it could just be this is in
18 lieu of all the stuff settling, but for me to go -- I
19 understand your suit is sort of almost an end run around the
20 class action, because I have to go third-party payor by
21 third-party payor -- let's assume there are thousands in
22 Arizona, I don't know how many thousands -- the citizens are
23 pretty easy because they won't know anything -- but I would
24 have to go literally, or some poor Arizona federal judge
25 would have to go, as you would have it done, third-party

1 payor by third-party payor to be able to decide whether
2 there were civil penalties, right?

3 MS. BRECKENRIDGE: I am not sure. To start with
4 that question first, I am not sure how many third-party
5 payors there are in Arizona.

6 THE COURT: Well, let's say there are hundreds.

7 MS. BRECKENRIDGE: That is one possibility. We do
8 not have the information on the third- --

9 THE COURT: So you're thinking that -- to some
10 extent, I was misquoted in defendants' brief on all the
11 things I said in terms -- it was mostly in the context of I
12 can't certify a class because the individualized knowledge
13 of each third-party payor would make it unmanageable. That
14 was primarily what a lot of the language had to do with.
15 But why wouldn't it be the exact -- I don't know how you
16 even go about handling a parens patriae claim when you've
17 got hundreds and hundreds of third-party payors, each with
18 different levels of knowledge and different practices.
19 You're saying, as a parens patriae, I shouldn't even think
20 that way? Is that basically it?

21 MS. BRECKENRIDGE: I'm not saying that the Court
22 shouldn't think that way, but that is one area that we will
23 have to conduct discovery into.

24 THE COURT: Was it disclosed during settlement
25 discussions that it wouldn't preclude you from doing this?

1 MS. BRECKENRIDGE: These claims were not released.
2 This case has actually been pending since 2005, I believe.
3 This was not in any way an end run around the class action,
4 which of course hadn't gone to trial at that point. This
5 was a real effort on behalf of the Attorney General of
6 Arizona, as have other Attorneys General brought similar
7 suits, to recover civil penalties on behalf of the state,
8 and also to seek injunctive relief.

9 THE COURT: Injunctive relief might be different
10 because I -- I thought this was filed in 2006 actually.

11 MS. BRECKENRIDGE: You could be -- the minute I
12 said 2005 I thought --

13 MR. MONTGOMERY: December of 2005.

14 THE COURT: December, all right, fair enough. So
15 as all of these cases were being on Track One and Track Two
16 and all this -- and maybe you don't know the answer to
17 this -- it was never sort of flagged that you could still
18 seek civil penalties as these cases were settling?

19 MS. BRECKENRIDGE: I can't answer that because I
20 wasn't necessarily in all the negotiations, but it has
21 always been a part of our complaint as well as the
22 complaints of other Attorneys General in other state cases.

23 THE COURT: I just don't remember it coming up
24 this way again before, and maybe -- I sort of thought these
25 cases were starting to go away. And I've been doing this

1 for seven years, and I'm sort of getting tired.

2 Now, let me ask you another question. You have an
3 appendix at the back of your -- how many drugs do you allege
4 both what you claim is a false price and what you think is
5 the real price? They claim you've -- I didn't have time
6 last night. I haven't gone through all of them. They claim
7 you've appended thousands and thousands of drugs, and in
8 none of them have you asserted what the real price should
9 have been, either a spread or what the real price would have
10 been.

11 MS. BRECKENRIDGE: I did not count the number of
12 drugs for which we did provide the two numbers that you're
13 referring to. It is true -- I have the appendix here --
14 that information does not appear in the appendix, but it
15 does appear in different places within the complaint.

16 THE COURT: So are there drugs that do not have
17 that spread or that differential in market price?

18 MS. BRECKENRIDGE: I believe we could gather that
19 information.

20 THE COURT: No. I want to know it's there now.

21 MS. BRECKENRIDGE: Okay. Yes, it appears in the
22 corpus, the body of the complaint. It does not appear in
23 the appendix.

24 THE COURT: No, but I don't care where it is,
25 whether it's in the appendix or it's in the body. Does

1 every single drug listed have the spread in it?

2 MS. BRECKENRIDGE: No.

3 THE COURT: So how many, roughly, have a spread
4 alleged with specificity and particularity, what the price
5 it's listed is and what the real price should have been?

6 MS. BRECKENRIDGE: I really couldn't estimate. I
7 could look at the --

8 THE COURT: Do you know?

9 MR. MONTGOMERY: We haven't counted, your Honor.
10 The appendices have about a thousand NDCs. The complaint
11 appears to have a pattern of alleging a spread with respect
12 to one, maybe two, maybe three drugs per defendant. So
13 we've got a small fraction of the total drugs that they --

14 THE COURT: Does that seem right to you?

15 MS. BRECKENRIDGE: Probably not the
16 characterization. I think they called it a "smattering" in
17 their briefing. When I went through to address that point,
18 I did look at the number. It is far more than a smattering.
19 Mr. Montgomery is probably correct --

20 THE COURT: But three or four per defendant, is
21 that what it would be?

22 MS. BRECKENRIDGE: No, that isn't correct. I
23 think in some instances there's more than a dozen.

24 THE COURT: All right, so a dozen per defendant,
25 but not thousands?

1 MS. BRECKENRIDGE: Not thousands. And if I could
2 just raise a housekeeping matter that neither Mr. Montgomery
3 nor I raised. Two of the appendices actually are now
4 irrelevant, I believe, because as of yesterday, the state
5 agreed to dismiss Biogen and Merck. That would be
6 Appendix B and Appendix C, your Honor.

7 THE COURT: Okay. So as you probably know, I
8 completely botched the New York case because people kept
9 filing new appendices and new substitute things, and there
10 was one whole slew of motions, but I was on an older
11 appendix, not a new one. So I want to make sure that I'm
12 always getting them because I had thousands of entries, and
13 I looked at one and not the other, so I've got to always
14 make sure. So at this point, though, those appendices
15 attached to which complaint?

16 MS. BRECKENRIDGE: There's only been one
17 amendment, so it is the -- I think we've called it the
18 amended complaint. It is the first amended complaint, and
19 it is the only amended complaint.

20 THE COURT: And as I understand it, you've dropped
21 all claims having to do with non-AWP-based methodologies,
22 right?

23 MS. BRECKENRIDGE: That is correct. This is a
24 case about average wholesale pricing.

25 THE COURT: Okay. So at this point, as far as --

1 there was a third -- I understand that on appeal right now
2 is the issue about whether, with respect to consumers, the
3 30 percent spread can be viewed as a matter of undisputed
4 facts or matter of law, or whatever the right words are. It
5 makes sense -- what I did in other cases is, I can't hold
6 the State of Arizona to the 30 percent yardstick in the MDL.
7 However, since I've never seen an iota of evidence that
8 there wasn't some spread in the physician-administered drugs
9 arena, what I've done in other cases is, I was going to hold
10 you to the spread. I forget what I said in other cases.
11 Was it 30 or 25?

12 MR. MONTGOMERY: 30, your Honor.

13 THE COURT: 30. I'm going to hold people to the
14 spread, so that we don't have unnecessary discovery, until
15 someone gives me another plausible theory. So for how many
16 people would -- would that be knocking out a lot of drugs?
17 In other words, I don't want discovery, I don't want all of
18 this unless there's some viable theory, either from the
19 First Circuit or from Dr. Hartman or whoever you're relying
20 on now. So how much does that affect right now?

21 MS. BRECKENRIDGE: I am not sure how much that
22 affects right now. I was aware of your holdings in the Iowa
23 and the New York case, and I followed that. In looking at
24 the defendants' briefing on the matter, they have identified
25 just eight drugs in their papers that they can say fall

1 below the 30 percent threshold. I --

2 THE COURT: What I'm going to be inclined to do --
3 and, I mean, I just want to short-circuit some of this --
4 is, to the extent that the complaint does not follow the
5 clear guidelines I have done over seven years, which is that
6 you have to put both the price and a spread, or the AWP and
7 the real market price, something to show that someone's done
8 their homework and there really was a discrepancy and it
9 exceeded the 30 percent, which was the number Hartman gave
10 me and I've lived with -- I didn't make it up -- I knew
11 nothing about this before I walked in the door -- that I
12 wasn't going to just waste people's time and go with it.
13 Now, I understand that there are thousands of drugs where I
14 don't have that information and at least twelve drugs where
15 it's below the 30 percent, so I'm inclined to either stay or
16 dismiss any case that doesn't meet those two requirements;
17 A, that it be over 30 percent, and, B, that a spread not be
18 alleged.

19 Now, that may leave 60 drugs. I don't know how
20 many it leaves, 60, 100 drugs. It will leave something.
21 And so we can get going on the discovery on that, stay the
22 under-30-percent issue and come back to it. Also I want to
23 stay all discovery having to do with things subject to a
24 settlement. I'm hoping it won't fall through, but I
25 understand why you want a placeholder. That's fair enough.

1 But I don't want to waste people's money going through
2 anything that's already been subject to a settlement, by
3 which I mean the disgorgement/restitution claims would
4 overlap, I think you'd agree, with the recovery in the
5 national class actions that have been agreed upon, or
6 possibly would come up -- you know, I've stayed the -- what
7 have I stayed now? I've stayed the national class action,
8 so that could come back up again, but it would overlap, and
9 I wouldn't -- right?

10 MS. BRECKENRIDGE: Yes, I'm trying to follow.

11 Yes.

12 THE COURT: I think that that's right. So I just
13 wanted to get through what we can just get through easily.

14 Now, on the self-administered drugs, I'm the least
15 confident because I didn't do a class action on the
16 self-administered drugs because I said there was no
17 possibility of a class action on them. And I don't
18 remember -- I've done generics through the Mylan case, but I
19 don't know that I've ever dealt with self-administered
20 branded drugs in any great detail so far, and I just thought
21 we should maybe focus some argument on that. And I don't
22 know how many drugs that are left fall in that capacity. I
23 don't know. Do you know?

24 MS. BRECKENRIDGE: I do not know the number, your
25 Honor.

1 THE COURT: And then there's the issue, are there
2 self-administered generic drugs?

3 MS. BRECKENRIDGE: There will be.

4 THE COURT: Or have those all been eliminated
5 because of the --

6 MR. MONTGOMERY: Well, there's of course the
7 self-administered generic drug that our client sells, which
8 is albuterol. And, of course, we had a judgment that runs
9 precisely in parallel with the claims that have been made
10 here. In light of that judgment, you know, we suggest that
11 your Honor ought to be applying the Bell Atlantic V. Twombly
12 standard to determine that there simply is no plausible
13 basis upon which --

14 THE COURT: But that only applies to one drug,
15 right?

16 MR. MONTGOMERY: That's right, that's right, but
17 we have, as you've seen in the briefs -- and I know the
18 briefs are very complicated, and they're complicated because
19 they go through the whole history of all of the rulings that
20 you've made in the last seven years, and we seek to have all
21 of them applied.

22 THE COURT: But, see, here's my problem with that,
23 which is, I understand why you do, and to some extent I'm
24 either going to stay the case pending the First Circuit
25 resolution of certain issues or pending the approvals of the

1 settlements. I think both sides are very fair about that
2 because if the settlements fall apart for some reason, they
3 should be able to have a placeholder. If the First Circuit
4 rules against you -- I think a million issues went up,
5 whatever -- that they can -- fair enough. But you've asked
6 for me to dismiss under Twombly the self-administered drugs
7 based somewhat on my holdings way back when, but I actually
8 was ruling on class cert issues primarily.

9 MR. MONTGOMERY: That's right, and we maintain,
10 your Honor, that those class cert rulings are significant,
11 that we're entitled to rely on them; that we're not supposed
12 to be subject, if the integrity of the MDL process and the
13 class action process is going to be sustained, to do this
14 all over again years later because for the reasons you
15 actually started --

16 THE COURT: Could you carve -- carve albuterol out
17 of it because I've gone through a whole trial on it. But on
18 all these other things, why is it implausible that if there
19 was a big mega spread between the AWP and the actual market
20 price -- now, I don't know if we're talking about branded --

21 MR. MONTGOMERY: We're talking about both.

22 THE COURT: -- or generic, probably both -- I
23 don't know why it's implausible that that draw caused them
24 harm.

25 MR. MONTGOMERY: Well, let me take first --

1 THE COURT: Alleging that --

2 MR. MONTGOMERY: Let's take first the generics.

3 They have abandoned non-MAC claims. In other words, they're
4 focusing just on AWP. At a minimum, I think we ought to
5 have some allegations that actually show that there's a
6 plausible basis for believing there are any such claims,
7 there are any such drugs, because we know the whole world is
8 subject to MAC pricing. It's exactly the reason that
9 generally with --

10 THE COURT: But that's why I required this
11 particularity. She claims -- and I must admit, last night I
12 didn't go through the complaint -- that there are X number
13 of drugs for which she alleged a false AWP and an actual
14 market price.

15 MR. MONTGOMERY: That's right, but what they
16 haven't alleged is that there are any transactions based on
17 AWP with respect to any of the third-party payors or
18 consumers that they purport to represent here. So what they
19 want to do is, after the fact they want to have us go
20 through a process that you determined to be impractical,
21 unmanageable.

22 THE COURT: But that was --

23 MR. MONTGOMERY: And they're going to say, sort of
24 as their insurance against dismissal by you, "Well, we're
25 really not dealing with MAC here. We're just dealing with

1 AWP." Well, where are those transactions?

2 THE COURT: Well, we're only in a motion to
3 dismiss stage.

4 MR. MONTGOMERY: I understand.

5 THE COURT: So you can shoot out interrogatories
6 and make them list it. I mean, I just -- I'm fully with you
7 in the sense that I have trotted through branded
8 physician-administered drugs, and I have this view that,
9 based on everything the plaintiffs have given me over seven
10 years, that there is an understanding in the industry that
11 developed at some point -- and we can debate when, in 2001,
12 we can debate when -- that there was at least some spread;
13 not a mega spread, some spread. But I haven't had the same
14 level of education in the self-administered area.

15 MR. MONTGOMERY: All right, let's move --

16 THE COURT: Because I threw it out before it even
17 got to class action stage.

18 MR. MONTGOMERY: So let's move from the private
19 market to the Medicare claims. You have addressed --
20 Medicare is almost exclusively a physician-administered drug
21 program, but there are several self-administered drugs, the
22 most prominent of which is albuterol. And I would say to
23 you with respect to Medicare and albuterol: You've been
24 there and we've done that.

25 THE COURT: I understand, you keep coming back to

1 it, but there are a lot of other drugs.

2 MR. MONTGOMERY: Well, they ought to identify
3 them.

4 THE COURT: I thought they did.

5 MR. MONTGOMERY: Because I'm not sure that there
6 is a single additional drug in their list that is a Medicare
7 drug. So I take your point, your Honor, that they ought to
8 tailor this complaint; they ought to do the work of going
9 through and actually tailoring it to the rulings that we've
10 discussed in our briefs.

11 THE COURT: Well, but they want to preserve
12 things. Maybe what I should just do is have it briefed that
13 way, I mean, in terms of -- because I don't know that you're
14 going to win a total knock-out punch on the kind of drugs
15 that I've never looked at, at least for purposes of a motion
16 to dismiss.

17 MR. MONTGOMERY: Yes, although, remember, there is
18 another way of looking at it, and the other way of looking
19 at it I think is where you started, which is, there is
20 something fundamentally wrong, while we're in our eighth
21 year of AWP litigation, for Arizona to be raising its hand
22 for the first time. And I should say, they're only raising
23 their hand because we filed a motion to dismiss. They have
24 been sitting in the weeds. And I went back the other day
25 and looked at the transcripts of hearings that you held,

1 your Honor, in 2005 and 2006 in which state AGs, not
2 represented by Mr. Berman but state AG's, Pennsylvania,
3 Iowa, Illinois, and others, raised questions about the
4 effect of your class certification ruling and what it was
5 going to mean for them. And you issued an order in Case
6 Management Order No. 10 that said, to the extent that there
7 were settlements, that the plaintiffs had to give notice to
8 state AGs. Mr. Berman stood here and twice said, "I assure
9 you, your Honor, if there are ever settlements, I will make
10 sure that the AGs are invited to the table."

11 Now, the Arizona AG I suppose you could say was
12 always on notice that these settlement discussions were
13 under way, that the trials were under way, that you were
14 making rulings because, of course, Mr. Berman was here for
15 all of it. But whether or not you go that far, you
16 recognized that --

17 THE COURT: Well, when you were trying to settle
18 these cases, I mean, I can't remember all the different
19 companies and all the different iterations, but were you
20 aware that -- well, at least since 2006 you were aware that
21 Arizona had filed this thing.

22 MR. MONTGOMERY: We were aware that Arizona had
23 filed, correct, but it wasn't our obligation to figure out
24 or any defendant's obligation to figure out whether Arizona
25 was serious, whether they intended to press this case or

1 not. It was Mr. Berman's obligation to bring them to the
2 table. So that when various parties have trotted in here
3 and you've gone through this very complicated settlement
4 process and made other rulings, you know, Arizona was, you
5 know, nowhere around that any defendant was aware.

6 So I think we were all entitled to assume that
7 Arizona was satisfied because Arizona's case is
8 sui generis. It is the only one of these state AG cases
9 that is a mirror image of the MDL class action. Every
10 single other state AG case focuses principally or
11 exclusively on Medicaid. So we're talking about something
12 that none of us have ever seen. And that's why the motion
13 to dismiss we presented to you is so unusual, it's why it's
14 so complicated, because we have to march through the history
15 of these cases seeking relief --

16 THE COURT: None of the other state AG cases are
17 seeking civil penalties for each of the fraudulent claims
18 that are being settled?

19 MR. MONTGOMERY: I can't -- well, not that --

20 MS. BRECKENRIDGE: I can address that. I
21 represent two other states, Nevada and Montana, and in both
22 of those cases, in which many of these defendants are
23 involved, we are seeking civil penalties. I believe that
24 there are three or five other states --

25 THE COURT: What happened to those cases?

1 MS. BRECKENRIDGE: You sent them back to their
2 home courts, and we're pursuing them there. We're actually
3 going to be in front of Judge Molloy next week in Montana.

4 THE COURT: I haven't gotten a hate e-mail yet
5 from him, so maybe --

6 MS. BRECKENRIDGE: We filed some status reports,
7 but we haven't been in front of him. But I would like to
8 address some of these points.

9 MR. MONTGOMERY: But just one cleanup point, which
10 is that this is the only case that I'm aware of that is
11 seeking cleanup civil penalties for Medicare in the private
12 market after all we have been through in the last seven plus
13 years.

14 THE COURT: Is that true?

15 MR. MONTGOMERY: That's just fundamentally wrong
16 here, your Honor.

17 MS. BRECKENRIDGE: I think that the reason why
18 that may seem to be the case is because of the point we are
19 at in this case procedurally. It just so happens that sort
20 of in the aftermath of the settlements, sort of at the
21 middle to end of last year, these motions to dismiss were
22 filed. Prior to that, there weren't any settlements. At
23 least in the other cases that would have affected the
24 claims, at least in the other cases I am involved in, the
25 issue just hasn't come up, but we haven't done any extensive

1 briefing on it.

2 THE COURT: Well, here's my sense -- and if you
3 could bring it back -- it feels wrong to me. I'm going to
4 call the mediator, actually, and find out whether he's
5 understood that this is part of it. I don't have any
6 problem at all with a placeholder, and maybe that's what it
7 was meant to be, if the settlements fall apart. And I
8 actually don't have a problem with the request for
9 injunctive relief. And I've already dealt with Iowa,
10 Massachusetts, and I can remember, several others dealing
11 with their Medicaid programs. And, of course, I have the
12 McKesson suit. But this is -- I just feel -- I looked at
13 this and I said, I thought this was behind us, or I thought
14 this was going to be part of the national class action that
15 I sort of mucked through these millions of laws on. I
16 didn't understand that there's the same lawyer looking for
17 duplicative relief. That's my concern.

18 MS. BRECKENRIDGE: Well, it is the same lawyer,
19 but it's a different state, and there are other states
20 seeking civil penalties as well.

21 THE COURT: But the national class action I think
22 includes Arizona, doesn't it?

23 MS. BRECKENRIDGE: The national class action, the
24 consumers?

25 THE COURT: Yes, the one that I stayed.

1 MS. HARRIS: It does include Class 2, your Honor.

2 THE COURT: Yes. I mean, it does. I mean, I --

3 MS. BRECKENRIDGE: But, for instance, your Honor,
4 the argument was made here that it was incumbent upon
5 Mr. Berman, quote/unquote, to "bring Arizona to the table,"
6 and it wasn't incumbent upon these defendants to settle
7 these claims. This case has been on file since December of
8 2005.

9 THE COURT: I know, but, listen, I'm trying to
10 bring some closure to these suits. I'm very much hoping
11 that the First Circuit decision will help clarify things:
12 Either this case is in a wastebasket, and you can all go
13 home after paying for your kids' college education, or it's
14 very alive and well, and I'm hoping it will settle. If not,
15 I'm here to do the -- I'll certify the national class
16 action, and it will go up again. But what is my nightmare
17 is that these cases keep coming in, and to the extent
18 it's -- I don't want to be surprised by them after a decade
19 of litigation. That's what I felt surprised by last night.

20 Now, I'm not going to make a legal ruling on that,
21 but I do think it adds a certain trust level, the "trust"
22 word, to the settlement discussions, if that's sort of like,
23 won't they all fall apart if they think all these AG things
24 aren't going to be resolved? Civil penalties for every
25 third-party payor transaction?

1 MS. BRECKENRIDGE: Well, not every Attorney
2 General has filed a case. The defendants are on these
3 cases. We have been in contact with the defendants. I
4 object to the characterization, and I'm not going to nitpick
5 here, but there were some delays on their side that were
6 inexcusable that I won't embarrass them by. We filed a
7 motion in July that's still pending, July, 2008, or June,
8 2008.

9 THE COURT: On what?

10 MS. BRECKENRIDGE: On discovery, the fact that the
11 state has this tremendous burdensome --

12 THE COURT: You filed what, a motion to compel?

13 MS. BRECKENRIDGE: I styled it as a motion for
14 protective order and to limit discovery, I believe.

15 THE COURT: Well, they should file an opposition
16 to it.

17 MS. BRECKENRIDGE: They did file an opposition to
18 it --

19 THE COURT: And is it pending in front of
20 Judge Bowler?

21 MS. BRECKENRIDGE: -- but it's not briefed,
22 nothing --

23 MR. MONTGOMERY: We don't want any discovery, your
24 Honor.

25 THE COURT: I understand.

1 MS. BRECKENRIDGE: It's not as if nothing has
2 been going on --

3 THE COURT: All right, so let me back up. There
4 seems to be a potential viable claim if the spreads are
5 alleged -- if they're not, I'm not touching them -- with
6 respect to some drugs. Do you know whether they're
7 self-administered drugs?

8 MS. BRECKENRIDGE: There are self-administered
9 drugs.

10 THE COURT: Where the spread was alleged?

11 MS. BRECKENRIDGE: Yes. Well, I believe so. I
12 would have to go back and confirm.

13 THE COURT: All right, so assume for a minute that
14 there's some self-administered. So tell me what the claim
15 is. Do you know for a fact whether any of the
16 self-administered drugs, whether they be branded or generic,
17 whether in fact the state paid for them -- actually, it's
18 not even the state. It's --

19 MR. MONTGOMERY: It's not the state.

20 THE COURT: It's third-party payors, I guess --
21 whether any third-party payors actually paid for them based
22 on AWP?

23 MS. BRECKENRIDGE: Yes. We did prefiling research
24 on sales of the drugs in the state.

25 THE COURT: So wait. So you actually have

1 information that some of the third-party payors paid based
2 on AWP for the self-administered drugs?

3 MS. BRECKENRIDGE: Yes.

4 THE COURT: And you must have looked this up
5 because if you're going to do civil penalties, you have to
6 know how many third-party payors there are in the state.

7 MS. BRECKENRIDGE: I do not know that information,
8 but I could find it out.

9 THE COURT: Okay. So I'm just trying to, you
10 know, under basic pleadings. So for every single one of
11 these drugs, you have at least one third-party payor who
12 paid based on AWP, rather than MAC or FUL or --

13 MS. BRECKENRIDGE: I should clarify, your Honor.
14 I mean, we have just recently sort of, I guess, conceded in
15 connection with the pleadings here that we are not -- and
16 part of what has come out in the MDL, Arizona is very
17 realistic. I don't want to say for now one appendix that is
18 so voluminous, I can't stand here and make an outright
19 representation that I might have to come back and modify. I
20 don't want to say that without having looked at the data
21 myself. But we can go back and remodel the appendix,
22 provide the information you've asked for, and file an
23 amended complaint, or at least an amended appendix, on that
24 basis.

25 THE COURT: I don't want to start the whole --

1 it's been a 2006 case. All I want is some representation
2 that for every drug for which a spread has been alleged,
3 that you think at least one third-party payor has paid the
4 AWP rather than the actual market price and that those were
5 mega-spread cases. Are all the ones that are actually
6 listed in the body of the complaint ones where the spread is
7 over 30 percent?

8 MS. BRECKENRIDGE: I believe the defendants have
9 identified eight that they say do not meet the 30 percent
10 threshold.

11 THE COURT: Well, let me ask, how do you suggest I
12 go about this? It's a massive complaint that's undoable by
13 me or a federal judge in Arizona. It's undoable, so --

14 MS. BRECKENRIDGE: Well, I did come prepared to
15 talk about that a little bit, and the first thing I'll
16 say -- and this isn't just fortuitous -- the state of
17 Arizona, as I think we've demonstrated already by dismissing
18 two defendants with unique circumstances, we've remodeled
19 our complaint once based on complaints by the defendants
20 that they thought that we had left language in there that
21 would allow us to bring claims on behalf of access to the
22 state Medicaid program. They complained. We asked them for
23 their specific points that they didn't like in the
24 complaint, and, frankly, we took it out. We have indicated
25 that we -- we see the map of how these cases are unfolding.

1 We are not going to pursue claims that are not based on AWP.

2 My suggestion is that the state be given a chance
3 to go back, take into account the inclination that you've
4 stated, that if we cannot demonstrate -- and I think what
5 you said is that if we can't demonstrate the spread for the
6 drug, you don't want to see it.

7 THE COURT: The thing that's frustrating me is,
8 I've been saying this -- I said it in the New York cases,
9 I've said it in the Massachusetts cases, I've said it --
10 so we're three years into this litigation. Why hasn't it
11 been done yet?

12 MS. BRECKENRIDGE: Well, I'll give you a very
13 practical response, and it's also in our brief. When we
14 filed the Montana and Nevada cases, we had an appendix just
15 like this one, and it was acceptable, and it did pass the
16 motion to dismiss stage. And in that instance, the Court
17 said that because it was a state bringing the claims, the
18 states did not have to identify the individual payors, we
19 didn't have to do that.

20 THE COURT: I'm not so worried about the
21 individual payors. I don't remember because it was so long
22 ago and I've had a lot of cases in between. There weren't
23 allegations, or at least it wasn't pressed in front of me,
24 with respect to what the spread was?

25 MS. BRECKENRIDGE: We did not provide that

1 information in those days.

2 THE COURT: You didn't provide a spread on all
3 of -- I don't remember. I don't remember if it was pressed
4 at that time or whether people just pressed the big issues.
5 I just don't remember. But since then, I've certainly had a
6 lot of cases. Since then, I know New York has, that's been
7 a big issue, and I can't remember, there's several other
8 cases where I've said: You can't just list thousands of
9 drugs. You have to do your research before you come in
10 here. I think, was it New York? Were there any others?
11 You all know my case. I don't even remember.

12 MS. HARRIS: Iowa.

13 MS. BRECKENRIDGE: Iowa and New York, I believe.

14 THE COURT: So I need to look at this. But at
15 least as we sit here right now, we're going to do the
16 following: There should be -- when we go forward, we're not
17 going to do -- we maybe will go forward on self-administered
18 drugs, but we're not going to go forward on anything that's
19 been litigated, anything that's on appeal, anything that's
20 less than 30 percent of the spread, and anything where there
21 hasn't been a spread alleged. I need to go look and see
22 what you did allege company by company. There's going to be
23 something left, likely, but then there's going to be some
24 expectation that you either prove up or throw out anything
25 where you can't show that anyone actually purchased at that

1 amount. If there's a spread alleged and it's over the
2 30 percent, you've got to do that.

3 Now, this is on a slow boat. McKesson is on my
4 fast boat. I don't remember if any of you are part of that.
5 That's on a faster boat. I have stayed the class action.
6 The Mylan case is still there somewhere. I don't know what
7 kind of boat that's on. But this is on my back burner
8 because I'm hoping, before this gets into full speed, that
9 at some point I get a ruling from the First Circuit, which
10 is what I really want to happen because this will either go
11 away or there's a better chance of settlement, I've got to
12 assume.

13 Now, let me just go off the record and ask this
14 for one minute here.

15 (Discussion off the record.)

16 THE COURT: Can we go back on for one minute.
17 That's what I was grappling with, whether or not there's a
18 one-year statute of limitations or a multiple-year. And at
19 least with respect to the disgorgement and the restitution,
20 et cetera, it would have to be a one-year, right, citizen by
21 citizen and third party? And you're just saying, for the
22 civil penalties, it's really the state? Is that what --

23 MS. BRECKENRIDGE: I haven't really looked at the
24 issue for the consumers, but the state, there is no statute
25 of limitations that applies to the state. I haven't looked

1 at --

2 THE COURT: So I know that's the debate, but let's
3 assume for a minute it cuts out roughly like that, you know,
4 you're saying the state gets to go back to the beginning of
5 time? There's no statute of limitations?

6 MS. BRECKENRIDGE: That is what the law is in
7 Arizona.

8 MR. MONTGOMERY: Well, and, your Honor, let me
9 just state even further how outrageous we think the penalty
10 claim is, for example. Their position, if you read it,
11 doesn't have anything to do with the timing of the filing of
12 their complaint. Mr. Berman could go or Hagens Berman could
13 go in the business of simply piggybacking on MDL settlements
14 all over the country for any state. He could do it in
15 securities cases, he could do it in drug cases, with respect
16 to a state that has no statute of limitations as to
17 sovereign claims, and there are quite a few states.

18 THE COURT: Well, what if they -- maybe they can.
19 I mean, there's nothing I can do about that, but --

20 MR. MONTGOMERY: Well, we think there is something
21 you can do about it. We think Baldwin United is the pathway
22 to do something about it, Bridgestone/Firestone, all cases
23 that have dealt with the integrity and manageability of
24 large MDL proceedings and have concluded the Federal Court
25 does have the power to stop state private class actions; in

1 Baldwin United, to stop state AGs from bringing actions
2 which interfere with ongoing MDL proceedings. So you
3 can't -- I mean, so there is -- the Second Circuit was very
4 clear that that authority is there.

5 THE COURT: And I take it Arizona isn't suing at
6 all on behalf of its Medicaid program?

7 MS. BRECKENRIDGE: It is not, your Honor. I would
8 like to respond to the Baldwin United argument, though.

9 THE COURT: Well, as you can tell, I find this
10 troubling, and I have -- I want to just make it clear -- no
11 problems with your putting a placeholder for the state if
12 all the settlements and the rest, the class actions don't
13 work out for one reason or another. What I have a problem
14 with is, basically all that could be worked out, and then
15 you want a penalty going back to the beginning of time for
16 every transaction.

17 MS. BRECKENRIDGE: And I will say that this case
18 has been on file, this case has been on file, and the
19 Attorney General did bring restitution claims on behalf of
20 the citizens of Arizona, as the Arizona Consumer Fraud Act
21 allows them to. There's only one cause of action here; it
22 is the Arizona Consumer Fraud Act. And the Fraud Act is
23 also very explicit as to the Attorney General's ability to
24 seek penalties, which will be paid to the state and then
25 held in a separate fund --

1 THE COURT: No, but answer me point-blank about
2 this. Assume for a minute we give through settlement,
3 trial, or class action trial, Arizona full recovery,
4 sometimes treble recovery to the consumers -- I think I've
5 given treble in several suits already -- to the consumers
6 and the third-party payors full recovery, are you still
7 planning on going forward and asking civil penalty by civil
8 penalty for each third-party payor and consumer?

9 MS. BRECKENRIDGE: At this time I'd have to say
10 "yes," but as I said, we're going to be responsive to what
11 happens in the settlements and in our discussions with
12 defendants. Baldwin United does not stand --

13 THE COURT: Have you asked the Attorney General
14 that question?

15 MS. BRECKENRIDGE: Yes. I have been in contact
16 with the Attorney General's office quite closely in
17 connection with these --

18 THE COURT: So even if I give treble damages to
19 all the injured people -- I'm not saying I am -- indeed the
20 whole case would get --

21 MS. BRECKENRIDGE: Well, I haven't asked that
22 question but --

23 THE COURT: I understand the Attorney Generals
24 position, if for some reason the class action gets thrown
25 out, or there may be a different decision by the First

1 Circuit on something, so I understand that. It's perfectly
2 valid to keep a placeholder there. But what's worrying me
3 is, I will do everything in my power to provide restitution
4 to people, and maybe treble damages, and then I'm still
5 going to be with a suit looking at thousands and thousands
6 and thousands of drugs and claims, each one seeking -- what
7 did you say it was per false claim?

8 MS. BRECKENRIDGE: The penalty per violation is up
9 to \$10,000.

10 THE COURT: Is it required, or is it equitable?

11 MS. BRECKENRIDGE: It's, at the discretion of the
12 court, equitable.

13 THE COURT: Just I've never seen that in this
14 case. Maybe it's out there. Maybe I've missed it. There's
15 been a lot going on. I'm worried about it.

16 So maybe you can jump into the settlement process
17 here. As I understand it, the national class action is
18 dead, right, because I've stayed it? There's no
19 discussions, no nothing, right? We're going to wait for the
20 First Circuit. Is anyone involved in that?

21 MS. HARRIS: Yes, right now you're right, your
22 honor; it's going to stay in place, no discussions are going
23 on.

24 THE COURT: Right, so maybe what the right answer
25 is -- and I'd ask you to go talk about it back at the

1 office -- is to stay this litigation and just wait and see
2 what happens, and then we can ask the Attorney General what
3 he wants to do. That would be one way of handling this. Or
4 dismiss without prejudice if in fact it's true that -- well,
5 you'd better not do that because there's statute of
6 limitations issues, but -- because that's what's really
7 worrying me. I mean, I can go trek through all the
8 little -- would that solve your problem, is we just put it
9 on a stay and figure out what to do?

10 MR. MONTGOMERY: Your Honor, it certainly would
11 solve our problem for now. You know, we have briefed most
12 of these issues. We'd be glad to talk about them on a more
13 complete record. You're right that there are developments
14 to come, both in the settlements and from the First Circuit,
15 and we could reassess. It of course would make sense in the
16 meantime for Arizona to get its act together on the scope of
17 what they really maintain is alive.

18 THE COURT: So let me know, what makes sense, a
19 week or two for you to think about whether or not the case
20 should just go on stay status pending the First Circuit
21 decision? That's what I did on the national class action.
22 If you want to move forward with it, fine, just tell me
23 that, fine. But I want you to sort of make a demand and see
24 if you can get into the settlement discussions. There are
25 settlement discussions going on with the states, and

1 apparently you're not part of it. Okay?

2 So let me know within a week what you want to do
3 with all of that. And if you don't want a stay it and
4 settlement looks unlikely, then I'll rule. But what I will
5 individually do, as a matter of judicial case management
6 discretion, is stay all the stuff that's going to be
7 directly impacted, either by the settlement or the First
8 Circuit opinion.

9 MS. BRECKENRIDGE: And we would like the
10 opportunity to revise our complaint to include the
11 information that your Honor mentioned earlier.

12 THE COURT: Maybe, maybe. Let me look at it. I
13 want to read the complaint now. How long is it?

14 MS. BRECKENRIDGE: Long.

15 MR. MONTGOMERY: Long.

16 THE COURT: Let me see it.

17 MS. BRECKENRIDGE: That's not double-sided.

18 THE COURT: Is that with or without the appendix?

19 MR. MONTGOMERY: This is the complaint, and this
20 is the appendix.

21 THE COURT: It's not as bad as some of my others.
22 You should see the New York appendix, or the one I misread.
23 And I will say that we -- let me just ask you off the
24 record.

25 (Discussion off the record.)

1 THE CLERK: Court is in recess.

2 (Adjourned, 4:35 p.m.)

3
4 C E R T I F I C A T E

5
6 UNITED STATES DISTRICT COURT)
7 DISTRICT OF MASSACHUSETTS) ss.
8 CITY OF BOSTON)
9

10 I, Lee A. Marzilli, Official Federal Court
11 Reporter, do hereby certify that the foregoing transcript,
12 Pages 1 through 37 inclusive, was recorded by me
13 stenographically at the time and place aforesaid in Civil
14 Action No. 01-12257-PBS, In Re: Pharmaceutical Industry
15 Average Wholesale Price Litigation, and thereafter by me
16 reduced to typewriting and is a true and accurate record of
17 the proceedings.

18 In witness whereof I have hereunto set my hand
19 this 9th day of February, 2009.
20
21
22
23

24 /s/ Lee A. Marzilli

25 _____
LEE A. MARZILLI, CRR
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